No. 86-1575

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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DEPARTMENT OF BANKING AND CONSUMER FINANCE OF THE STATE OF MISSISSIPPI,
*Petitioner*,

v.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, AND DEPOSIT GUARANTY NATIONAL BANK,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

In opposition to the Petition, Respondents Deposit Guaranty National Bank ("Deposit Guaranty") and Robert L. Clarke, Comptroller of the Currency ("Comptroller"), gloss over and never deny the critical point in this case which warrants the granting of this petition: if Respondents prevail, national banks in Mississippi will achieve a competitive advantage in the matter of branching over the 117 state-chartered banks in Mississippi, a result which this Court repeatedly has held is precluded by the McFadden Act of 1927, 12 U.S.C. § 36 (1982), the Act governing the branching authority of national banks. *See, e.g., First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969); *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966).

Further, the particular theory employed by Respondents to avoid this mandate and permit a national bank to engage in branching prohibited for state-chartered banks has been faced in four prior cases, including two decisions of United States courts of appeals, deciding, as the district court below decided, that the McFadden Act prohibits national banks from obtaining such a competitive advantage over state banks by the device of relying upon the branching authority of other financial institutions chartered by a state.[1] The opinion of the Fifth Circuit below stands as the *only* decision to the contrary, adopting a legal theory which would eviscerate the branching restrictions of the McFadden Act as to state banks in Mississippi and twenty-one other states.[2] Accordingly,

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[1] *See Mutschler v. Peoples National Bank of Washington*, 607 F.2d 274 (9th Cir. 1979); *Dakota National Bank & Trust Co. v. First National Bank & Trust Co. of Fargo*, 554 F.2d 345 (8th Cir.), *cert. denied*, 434 U.S. 877 (1977); *Department of Banking & Consumer Finance of the State of Mississippi v. Selby*, 617 F. Supp. 566 (S.D. Miss. 1985) (App. at 21a); *First National Bank & Trust Co. of Okmulgee v. Empie*, Nos. 78-296-C and 79-315-C (E.D. Okla. Nov. 15, 1982 and Dec. 17, 1982); *State Chartered Banks in Washington v. Peoples National Bank of Washington*, 291 F. Supp. 180 (W.D. Wash. 1966).

[2] Petition for Certiorari ("Petition") at 11-12.

Mississippi has now been joined by eight states as *amici curiae* in seeking a review of the decision below.

## THE DECISION OF THE FIFTH CIRCUIT CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN *WALKER* AND *PLANT CITY*.

Plunging through all of the language in the decision of the Fifth Circuit, and in Respondents' briefs, one incontrovertible fact remains: under the construction given to Section 36(c) of the McFadden Act by the Fifth Circuit, national banks would have greater branching powers than state chartered banks. This outcome is directly contrary to the holding of this Court that the purpose of this statutory provision is to "place national and state banks on a basis of 'competitive equality' insofar as branching [is] concerned." *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. at 261. *That is a clear-cut conflict.*[3]

The Comptroller attempts to justify refusal to consider the Mississippi state law distinctions between banks and savings and loans by analogizing this case to the decision of this Court to use a federal definition of "branch" for purposes of 12 U.S.C. § 36(f). Comptroller Br. at 6. *See*

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[3] Respondents attempt to distinguish this Court's decision in *Walker* by arguing that a national bank need comply only with state law "specifically regulating branching." Brief of Deposit Guaranty ("Desposit Guaranty Br.") at 9; Brief of Robert L. Clarke, Comptroller of the Currency of the United States ("Comptroller Br.") at 8. It would be absurd for Mississippi to have to restate, in the branching restriction provisions governing savings and loans, the other requirements that a financial institution must meet to qualify as a savings and loan within the meaning of the statute (and thereby enjoy state-wide branching); yet, that is effectively what Respondents argue the state must do under *Walker* before those requirements apply to branching. This is *precisely* the sort of selective use of the state statute that this Court rejected in *Walker*: "It is a strange argument that permits one to pick and choose what portion of the law binds him." *Id.* at 261. Far from endorsing selective use of the state statute, this Court in *Walker* ruled that all of the state "policy" regarding branching is absorbed into Section 36(c) of the McFadden Act. *Id.* at 262.

*First National Bank in Plant City v. Dickinson*, 396 U.S. 122. However, in so doing, the Comptroller ignores the critical distinction between 12 U.S.C. § 36(f), which makes no reference to state law, and 12 U.S.C. §§ 36(c) & (h) (1982), which specifically incorporate state law. This precise distinction between Section 36(f) and 36(c) was confirmed by this Court in *Walker*, 385 U.S. at 261-62.[4]

Respondents rely heavily on powers recently given to savings and loans. However, in providing for these new powers, Congress has maintained a distinction between banks and savings and loans just as Mississippi has maintained this distinction in very elaborate form.[5] As the Fifth Circuit below noted: as recently as the Garn-St. Germain Act, Congress has made clear its intention to maintain the status of savings and loans "as the nation's primary home lender," with a regulatory scheme that "differs from the regulation of the traditional bank." App. at 43a-44a. Similarly, as the district court below stated in its opinion:

> The branching provisions relevant to commercial banks and savings associations are part of a legislative scheme devised by the Mississippi legislature to insure that both types of institutions will provide the best service to Mississippi consumers.

App. at 28a. While some functional similarities may exist, the facts of significance are that, under Mississippi law, banks are legally and functionally different from savings and loans. The McFadden Act obliges the Comptroller to accept that difference. In *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681 (1986), this Court specifically rejected an effort by the Board of Governors to extend its jurisdiction to "nonbank banks" based on use of a functional definition of banks in lieu of the definition contemplated by the statute and in the legislative

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[4] *See* Petition at 10.

[5] *See* Petition at 6 n.4. *Compare* Miss. Code Ann. §§ 81-1 *et seq.* through §§ 81-9 *et seq.* (1972 & Supp. 1986) *with* §§ 81-12 *et seq.* (Supp. 1986).

history. *Id.* at 685-89.[6] This Court has mandated that "the Congressional policy of competitive equality with its deference to state standards [is not] open to modification by the Comptroller of the Currency." *First National Bank in Plant City v. Dickinson*, 396 U.S. at 138.[7]

**RESPONDENT DEPOSIT GUARANTY HAS MISSTATED MISSISSIPPI STATUTORY LAW AND, AS A RESULT, THE ISSUE IN THIS CASE.**

In a misleading effort to buttress Respondents' "functional" basis for ignoring the considerable differences between banks and savings and loans under Mississippi law, Deposit Guaranty contends that Petitioner incorrectly identifies institutions as "savings and loans" that should be called "banks" under the Mississippi Code.[8] This is wrong.

The term "savings and loan" is specifically incorporated into the definition of the institutions governed by the Mississippi Department of Savings Associations (*see* Miss. Code Ann. § 81-12-3(a) (Supp. 1986)), the entity

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[6] In fact, the Fifth Circuit's conclusion that NOW accounts offered by Mississippi savings associations (Miss. Code § 81-12-149 (Supp. 1986)) are the equivalent of bank payment-on-demand checking accounts runs afoul of *Dimension*. App. at 17a, 19a. This Court in *Dimension* specifically rejected an effort to use a "functional" definition to include institutions within the definition of bank based on the similarities between NOW accounts and payment-on-demand checking accounts, notwithstanding that they "have much in common" and "generally serve the same purpose." *Id.* at 689.

[7] The recent decision of this Court in *Clarke v. Securities Industry Ass'n*, 107 S. Ct. 750 (1987), provides no basis for concluding otherwise. This Court's decision that discount brokerage offices operated by banks are not embraced by the McFadden Act has nothing to do with the issue in this case. However, just as a review of historical circumstances made it clear that a securities business conducted by a bank is not covered by the Act (*Id.* at 760-62), a review of historical circumstances makes it clear that Congress did not intend to include savings and loans in the McFadden Act. *See* Petition at 5 n.3, 13.

[8] Deposit Guaranty Br. at 1-4.

charged with the execution of all laws "relating to associations carrying on *savings and loan* business in this state." Miss. Code Ann. § 81-12-11(1) (Supp. 1986) (emphasis added). In contrast, the term "bank" is never used anywhere in the Mississippi code to refer to savings associations or savings and loans. Every corporation "carrying on a commercial banking business, or the business of a savings bank, or trust company" is to be chartered as a "bank" and regulated by Petitioner. Miss. Code Ann. § 81-3-3 (1972).[9]

Given the broad and clear distinctions in Mississippi law between banks and savings and loans, it is misleading for Deposit Guaranty to refer to savings and loans as "banks," and then to use that reference to justify state-wide branching by a national bank. The McFadden Act expressly prohibits such a loose interpretation of its branching requirements.[10]

**THE DECISION BELOW IS CLEARLY IN CONFLICT WITH THE DECISIONS OF THE EIGHTH AND NINTH CIRCUITS.**

Respondents make a number of grievous errors in an effort to explain away the obvious conflict between the decision below and the decisions of the Eighth and Ninth Circuits, *e.g.*, *Mutschler v. Peoples National Bank of Washington*, 607 F.2d 274; and *Dakota National Bank*

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[9] The decision below erroneously refers to this statute as a "former" law. App. at 38a. However, it is still the law in Mississippi. Given the absence of any support in Mississippi statutes for its position, Deposit Guaranty must rely upon an administrative rule of the Mississippi Department of Savings Associations, which permits savings and loans chartered under Mississippi law to use the words "savings bank." *See* Miss. Savings Rule 16.1. That administrative ruling, however, in no way repeals, amends, or changes the clear-cut provisions of Mississippi state law distinguishing between banks and savings and loans.

[10] *See* 12 U.S.C. § 36(c) (1982).

*& Trust Co. v. First National Bank & Trust Co. of Fargo*, 554 F.2d 345.[11]

The argument of Respondents that no conflict exists contradicts the earlier action of the Comptroller, who clearly recognized the conflict in his decision below (upheld by the Fifth Circuit). App. at 8a-12a. Similarly, the district court below noted that "*the Comptroller's position has been rejected by every court that has considered it. . . .*" App. at 30a n.15 (emphasis added).[12]

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[11] Deposit Guaranty also erroneously attempts to distinguish the two district court cases on point, both of which support Petitioner. *See First National Bank & Trust Co. of Okmulgee v. Empie*, Nos. 78-296-C and 79-315-C; *State Chartered Banks in Washington v. Peoples National Bank of Washington*, 291 F. Supp. 180. The Comptroller misses the point on these two cases entirely, focusing on an irrelevant aspect of the *State Chartered Banks* decision (an analysis of 12 U.S.C. § 36(f)) and ignoring the *Empie* decision. Comptroller Br. at 9.

[12] By contrast, none of the arguments advanced by Respondents claiming an absence of a conflict have merit. First, Respondents cite an article, written by a trial attorney with the Comptroller of the Currency, faulting the factual record and reasoning of the courts in *Dakota National Bank* and *Mutschler*, but which, contrary to Deposit Guaranty's contention, never says they would not be in conflict with a decision such as the decision below. Deposit Guaranty Br. at 7; Comptroller Br. at 9. *See* Griffin, *Branching by National Banks: Must the "(h)" Always Be Silent?*, 3 J. of L. & Com. 243, 251-53 (1983). Second, Deposit Guaranty chides Petitioner for not seeking a rehearing before the Fifth Circuit concerning this conflict. Deposit Guaranty Br. at 6-7. Yet, the failure of the Fifth Circuit below to address the conflict issue was specifically called to the court's attention in Petitioner's February 25, 1987 Motion For a Stay of Mandate Pending Petition For Certiorari to the United States Supreme Court, *granted* on March 5, 1987. Third, Deposit Guaranty *assumes* that the courts in *Mutschler, Dakota National Bank, Empie* and *Peoples National Bank* were dealing with financial institutions that were, in Respondents' parlance, functionally different from Mississippi savings and loans. Deposit Guaranty Br. at 7-9. In fact, in the *Dakota National Bank* case, the state bank would be a "bank" under Respondents' definition. *See* N.D. Cent. Code § 6-09-02 (1975). While the Comptroller now states that the *Dakota National Bank* case dealt with a com-

Most importantly, however, Deposit Guaranty ignores the reasoning of the decisions with which the Fifth Circuit is in conflict. These courts did not question the national banks' contentions that they were facing competition from the state financial institutions involved. However, under the reasoning of these courts, that fact was insufficient. These courts reasoned that, in any event: (1) the institutions upon which the Comptroller relied to establish branching authority for national banks did not fit within the meaning of state banks in the McFadden Act, and (2) allowing the claims of the national banks would put state chartered commercial banks at a competitive disadvantage in the matter of branching.[13]

Ironically, if the decision of whether an institution is a bank under Section 36(h) of the McFadden Act, 12 U.S.C. 36(h), turned, as Deposit Guaranty suggests,[14] on whether the institution was authorized by state law to use in its name the word "bank" or some other word used in Section 36(h), the conflict between the cases noted above and Deposit Guaranty's reasoning is even more sharply outlined. They all involved institutions with the section 36(h) words "bank" or "trust company" in their names.[15] Thus, irrespective of whether

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pletely different issue (Comptroller Br. at 9-10), in that case the Comptroller was claiming that a competing state bank had an unfair competitive advantage in branching, just as Respondents now claim in this case. Finally, the article on which Respondents rely recognizes that, in at least one of these cases, *Empie*, the court had before it a carefully developed record and a Comptroller decision based on the reasoning advanced by Respondents in this case; but that reasoning was rejected by the court. *See* Griffin, *Branching by National Banks: Must the "(h)" Always Be Silent?*, 3 J. of L. & Com. at 252-55.

[13] *See* Petition at 7-9.

[14] Deposit Guaranty Br. at 1-2, 5.

[15] *Mutschler*, 607 F.2d at 279 ("mutual savings bank"); *Dakota National Bank*, 554 F.2d at 355 ("Bank of North Dakota"); *Empie*, Nos. 78-296-C and 79-316-C, slip op. at 6 ("trust companies"); *State Chartered Banks*, 291 F. Supp. at 199 ("mutual savings bank").

the focus is on function or form, the decision below is in conflict with the circuit court decisions in *Mutschler* and *Dakota National Bank*, as well as the district court decisions in *Empie* and *State Chartered Banks*.

Ultimately, even Deposit Guaranty was forced in its brief to admit that the Fifth Circuit decision below is in conflict with the Ninth Circuit decision in *Mutschler*.[16] Deposit Guaranty argues that the Ninth Circuit was in error when it explained that even if a mutual savings bank was a "state bank" for purposes of the McFadden Act, the requirement of Section 36(c) of the McFadden Act that national bank branching rights are "subject to the restrictions as to location imposed by the law of the State on State banks" means that a national bank may not avail itself of the branching rights of such a mutual savings bank unless the national bank satisfies all of the provisions of the state statute governing mutual savings banks. *Id.* at 280. This is a conflict which should be resolved by this Court.[17]

**THIS COURT SHOULD NOT LET THIS CASE STAND AND DEFER RESOLUTION OF THE IMPORTANT ISSUE RAISED HERE.**

As Respondents have correctly noted, Mississippi changed its law in April 1986 to include a graduated ex-

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[16] Deposit Guaranty Br. at 15-17.

[17] Deposit Guaranty Br. at 15-17. While denying the confiict, the Comptroller makes the same argument. Comptroller Br. at 8-9. The resolution of that conflict is, of course, a function for this Court following a grant of the Petition. Petitioner's position is that Respondents are wrong. The Ninth Circuit approach is precisely what Petitioner argues for here. The Comptroller invokes an asserted right to make his own determination when there has been a rapid change in the industry. Comptroller Br. at 7. However, just last year this Court rejected a similar effort by the Comptroller to invoke his expertise in contravention of the language and history of the applicable legislation, in response to rapid change that had placed banks in competition with "non-bank banks." *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681.

pansion of branching rights for state chartered banks.[18] It is important to note, however, as recognized by Deposit Guaranty at page 11 of its brief, that "the new statute does *not* give the banks petitioner regulates complete equality in branching with the banks [sic] regulated by the Department of Savings Associations." (Emphasis added.) Mississippi is entitled to the full protection of the McFadden Act as it phases in these changes in its law.

Under the reasoning of the Fifth Circuit below, contrary to the fundamental purpose of the McFadden Act and all of the prior decisions interpreting that Act, the state-chartered banks in twenty-two states may be subjected to competition from national banks with broader branching privileges. To prevent that inequity, this Court should follow the request of Mississippi and the eight *amici* states by taking this opportunity to resolve the important issue raised by this case.[19]

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[18] *See* Miss. Code Ann. § 81-7-7(5) (Supp. 1986).

[19] The single decision of the Comptroller in a recent Georgia case (Comptroller Br. at 10-11) does not alter the legitimate concerns of these states, as indicated by the decisions of eight states to file an *amici* brief in support of the Petition. Even if some states presently do not grant their savings and loans powers that the Comptroller would determine make them functional equivalents of banks, that situation is likely to change as states respond to the increased powers granted to federal savings and loans by the Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C. § 1461 *et seq.* (1982 & Supp. III 1986). *See* Petition at 6 n.4.

## CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should be issued to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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